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FILED
APR 23 1954
HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 711

RALPH G. LEMKE,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause, affirming the judgment of the District Court for the Territory of Alaska, Fourth Judicial Division, Number 13,342, and from the order of said Court of Appeals, denying petitioner's Petition for a Rehearing.

Opinions and Orders Below

The judgment of the Court of Appeals affirming the judgment of the District Court for the Territory of Alaska,

Fourth Judicial Division, was entered on the 19th day of February, 1954, and has not yet been reported. A Petition for a Rehearing was denied on the 22nd day of March, 1954.

Jurisdiction

Jurisdiction of this court is invoked under the 5th, 6th, and 14th Amendments of the Constitution of the United States, denying to the defendant the right of due process of law.

The indictment in this case failed to state facts sufficient to constitute a crime.

The decision of the Court of Appeals for the Ninth Circuit in this case is in direct conflict with another decision of the same Court, to-wit: *Foster, et al.* vs. *United States,* 253 Fed. Page 481, involving the same question presented in this case, and is also in direct conflict with the decision of the Supreme Court of the United States, to-wit: *Keck* vs. *United States,* 172 U. S. Page 434.

This case requires the construction and application of the Act of Congress, March 3, 1899, establishing the penal and criminal laws of the United States of America, and the procedure thereunder relating to the District of Alaska, particularly Chapter 429 of the United States Statutes at Large, 55th Congress, 1897-1899.

Statutes Involved

The statutes involved are set forth in the appendix to this petition and are as follows:

Act of Congress, March 3, 1899, Chap. 7, Sec. 38, Page 1289; Chap. 13, Sec. 184, Page 1282; Chap. 3, Sec. 54, Page 1260, Chap. 10, Page 1294.

Issues Presented

The complaint in the District Court alleges:

"On or about the 10th day of October, 1951, in the Fourth Judicial Division, Territory of Alaska, Ralph G. Lemke feloniously attempted to obtain from the Civilian Mess at Ladd Air Force Base, Alaska, money, by false token and with intent to defraud, in that the said Ralph G. Lemke, as the authorized agent of the said Civilian Mess, signed and presented for payment in the ordinary course of business, receipts for $60.00 in value of merchandise, which receipts constituted an authorization to the seller, Paul Elbert, for payment of money in the amount set forth thereon, which said merchandise was known by the said Ralph G. Lemke not to have been received by the said Civilian Mess, it being prearranged that said $60.00 when paid would be divided, $20.00 to the said Paul Elbert and $40.00 to the said Ralph G. Lemke, contrary to the provisions of Section 65-5-81, Alaska Compiled Laws Annotated, 1949."

The complaint fails to state facts sufficient to constitute a crime, hence the Court was without jurisdiction. The Court erred in overruling appellant's motion to dismiss the indictment. The Court erred in denying appellant's motion for an instructed verdict. The Court erred in refusing to give the instructions requested by the appellant. The Court erred in refusing to instruct the jury as to what constituted the material allegations of the indictment.

Points and Authorities Relied upon for Granting the Writ

"An indictment based upon that portion of Rev. Stat. Page 3082, which makes it an offence to 'fraudulently or knowingly import or bring into the United States, or assist in doing so, any merchandise contrary to law,' charging

that the defendant, on a date named, 'did knowingly, wilfully and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia,' diamonds of a stated value, 'contrary to law, and the provisions of the act of Congress in such cases made and provided' is clearly insufficient, as the allegations are too general, and do not sufficiently inform the defendant of the nature of the accusation against him." *Keck* vs. *United States*, 172 U. S. Page 434.

(1) "Defendants, charged with crime, have a constitutional right to be informed of the nature and cause of the accusation against them.

(2) An indictment charging that defendants, in violation of the Espionage Act, conveyed false reports, with intent to interfere with the success of the military and naval forces of the United States, etc., but which did not specify the reports, or to whom they were made, but merely followed the language of the statute, held insufficient; the statute itself being general." *Foster, et al.* vs. *United States*, 253 Fed. 481.

"Under the Constitution of the United States, which is not a restriction on the states in this respect, and by like provisions in the constitutions of the various states, accused is entitled to be informed of the nature and cause of the accusation against him." Constitutional and Statutory Provisions—In General, 31 C. J., Sec. 170, Page 650.

"It is not within the legislative power to dispense with the necessity for such an accusation where the Constitution requires it, or to declare that that which does not set forth the constituent elements of a criminal offense is an indictment. In this respect, it is the general rule that a void indictment or information is the same as no formal accusation at all." 28 Amr. Jr., Sec. 2, Page 585.

"A person cannot be convicted of an attempt to obtain money or property by false pretenses unless he has actually made representations to the person from whom the property or money is intended to be obtained, or to such person's agent." 22 Amr. Jur., Sec. 80, Page 488.

"However, a different situation is presented where the defendant, intending to commit a crime, proposes to a third person to assist in it, and he, seeking to decoy the defendant and secure his conviction, assents to the scheme and assists in carrying it out after notifying the authorities. In such a case the defendant cannot be convicted unless he does or participates in all the acts necessary to constitute the crime. The principle here involved is that the defendant cannot be charged with any act done by the decoy, because the decoy has no criminal intent." 15 Am. Jur., Sec. 335, Page 25.

"It is, of course, necessary that the defendant should have directly participated in so much of the entire transaction that the acts which he himself personally committed shall alone be sufficient to make out a complete offense against the law; for no act done by his feigned accomplice may be imputed to him, and if, in order to constitute the offense, it is necessary that something done by the supposed confederate shall be imputed to the accused, then the prosecution will fail. Or if it appear that the intent to commit the crime did not originate with the accused but was suggested by the person present with him, and that he was not intentionally carrying out his own criminal purpose, the prosecution will likewise fail." *People* vs. *Lanzit*, 233 Pac. 816-821.

"The act or acts which defendant has performed must be more than merely preparatory; they must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation of the

crime, and they must be adapted to secure that end. * * * Accused cannot be convicted of an attempt to obtain money or property by false pretenses where, had he succeeded in what he attempted, he would not be guilty of the crime of obtaining by false pretenses." 35 C. J. S. Sec. 36, Page 678.

"If the means employed are so clearly unsuitable that it is obvious that the crime cannot be committed, or, it has been held, if its consummation is dependent on the conduct of a third-person-principal who has an opportunity to frustrate it, the attempt is not indictable." 22 C. J. S. Sec. 77, Page 142.

"(7) III. Where the carrying out of an attempt to commit a crime is dependent upon and subservient to the conduct of some third person, and that third person is interested as a principal thereof, or is interested as one of the claimants, and has the opportunity to frustrate the commission of the crime by refusing to accept the benefits of the plan, there can be no crime committed. *State* vs. *Fraker*, 148 Mo. 143, 49 S. W. 1017. * * * All the indictment alleges is the mere presentation of the claim with an offer or demand of settlement for a sum certain, and, even with a criminal intent, that would not constitute a crime. At best, the indictment alleges a mere preparation to commit a crime where no overt act is alleged to have been done in the consummation after such preparations.

"We therefore think that the trial court properly sustained the motion to quash the indictment, and the judgment of the trial court is affirmed.

"All concur." *State* vs. *Block*, 62 S. W. (2d) 431.

Statement

The appellant, Ralph G. Lemke, was convicted of the crime of attempting to obtain money by false pretenses in

violation of Sec. 54, Page 1260 of the Act of Congress of March 3, 1899, establishing the penal and criminal laws of United States of America, and procedure thereunder relating thereunder to the District of Alaska. (Sec. 65-5-81, Alaska Complied Laws Annotated 1949). "Obtaining money or property by false pretenses. That if any person shall, by any false pretenses or by any privy or false token, and with intent to defraud, obtain, or attempt to obtain, from any other person any money or property whatever * * * such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than five years."

The motion of the defendant to dismiss the indictment on the grounds that the indictment failed to state facts sufficient to constitute a crime (demurrer) was overrruled by the trial court, and it is the contention of the appellant that the motion should have been sustained and the action dismissed.

A consideration of the evidence produced by the government in support of the allegations of the indictment clearly indicates that the indictment itself fails to state facts sufficient to constitute a crime.

The evidence produced by the government shows that Paul Elbert had purchased vegetables for the use of the cafeteria which Lemke was operating as manager, and that he claimed that Lemke made a proposition to him to prepare three slips or bills amounting to $60.00 for merchandise which was not to be delivered to the defendant, and that said defendant would approve said pretended sale of vegetables or invoices in the sum of $60.00 and place them for payment, so that the said sum of $60.00 would be paid to the said Elbert and that they would then divide the money $20.00 to Elbert and $40.00 to defendant, Lemke. Elbert claimed that he prepared the sales slips and that

appellant approved the same, and presented them in the ordinary course of business for payment. All of this testimony of Elbert between appellant and himself and the preparation of the false token is not corroborated by the testimony of any other witness.

Both the trial court and the Appellate Court held that said Paul Elbert was not an accomplice because he had notified an officer of the Ladd Air Force Base before he prepared the false token; that he had no intention of committing a crime or accepting any money which he was authorized to accept under said false token. The plaintiff's witnesses testified that no attempt was made by either Lemke or Paul Elbert to obtain any money from the Ladd Air Force Base, or any offer thereof and no money was demanded or paid, and the only person who could have received or obtained money from the Ladd Air Force Base was the said Paul Elbert.

Argument

The indictment shows that Paul Elbert was the only person who could have collected the money, and as he had informed the O. S. I. officials, the question of an accomplice is not involved because Elbert was not intending to commit a crime, so anything he did would not result in the commission of a crime. In preparing the false token, Elbert must have acted as a person, pure in heart, solely for the good of society and to entrap the defendant in the commission of a crime.

To carry out this purpose, let's assume that the officer of the Civilian Mess at Ladd Air Force Base had delivered to Paul Elbert upon demand the sum of $60.00 in bills which could be identified, and that Paul Elbert offered to pay to the appellant $40.00 according to the claimed agreement, and that appellant refused to accept the said $40.00. The

question arises as to what crime appellant would then have been guilty. Would the acceptance of the $40.00 constitute an overt act or must the law presume that because the appellant had assisted in the preparation of a false token that he could not change his mind and refuse to commit the overt act necessary under the statute to show guilt? Can the law say that because he made it possible for Paul Elbert to obtain money by false pretenses that he could not change his mind and refuse to participate in the commission of the crime? The law presumes a man to be innocent until his guilt is established beyond all reasonable doubt, and until a defendant commits an overt act he cannot be said to have committed a crime, and the reading of the statute is plain that there must be an attempt to obtain money and that the mere preparation of a false token is not sufficient to constitute obtaining or attempting to obtain money by false pretenses.

The opinion of the Appellate Court clearly shows that the Civilian Mess must have been defrauded and have parted with money as a result of false pretenses before a crime could be committed, but the opinion does not take into consideration the fact that Paul Elbert was the only person who could, under the false token, have received money, and no officer intervened or prevented the money from being paid.

As stated in the opinon of the Appellate Court, it is elementary that the mere preparation to commit a crime not followed by an overt act done toward its commission does not constitute an attempt. (*Wooldridge* vs. *United States*, Ninth Circuit, 237 Fed. 775.) This case and the decision cited thereunder clearly shows that the mere preparation to commit a crime does not constitute an attempt, and the preparation in this case of the false token, never to be used for an unlawful purpose by the only person who

could use it, can in no stretch of the imagination be construed to constitute an attempt to obtain money by false pretenses.

In view of the court's instruction, the jury evidently believed that all that was necessary in order for them to return a verdict of guilty was for the government to prove the preparation of a false token which was signed and presented for payment by the defendant. The court refused to instruct the jury as to what constituted the material allegations of the indictment and refused to give the requested instructions of the defendant that the mere execution of a false token was not sufficient to justify a conviction, and that it was necessary to prove that an attempt was made to obtain money by means of a false token.

In view of the law as stated in the authorities hereinabove quoted it seems plain that where two people conspire to commit a crime and the commission of the crime depends upon joint and separate acts of the two persons involved and where one person acts with no criminal intent and refuses to carry out his part of the plan and does not intend to participate in the commission of a crime and refuses to perform what is necessary in order that the crime be committed, that no crime has been committed.

According to the evidence all that is claimed is that the defendant performed certain acts which would have made it possible for Paul Elbert to have committed a crime. Paul Elbert claims that he had no intention of committing a crime and never received, or attempted to receive, any money by false pretenses. In order for the defendant to have received any money by false pretenses it was necessary for him to depend upon Paul Elbert to comply with an agreement which Elbert claimed had previously been entered into between the defendant and himself.

If it were not a crime for Paul Elbert to prepare a false

token and he was not an accomplice in the preparation of the same because of lack of intent, even though prepared under the direction of the appellant, it would seem that one person by himself could not be said to have conspired to commit a crime.

The testimony of Paul Elbert clearly shows that neither he nor the defendant ever tried to collect any money from the Civilian Mess or from the O. S. I., and that no money was ever paid on the account of the false receipts prepared by the said Paul Elbert. (Transcript of Record, Pages 32 to 41, inc.) Is it not dangerous to place in the hands of a witness such as Paul Elbert, not an accomplice, the power to convict another person on his uncorroborated testimony? His testimony clearly shows that he had no intention of ever collecting any money and that as far as he knew, the defendant had no intention of collecting any money or to cause the Civilian Mess or any officer thereof, to depart with any money on account of said false vouchers. If the defendant were guilty of anything, he would necessarily be guilty of receiving money by false pretenses, because no attempt was made by him to recover, by virtue of said false bill, and the only overt act which he could have committed would have been to receive the money when offered, and which he had a right to refuse to accept up until any time that the offer was made.

We believe that the indictment fails to state facts sufficient to constitute a crime within the meaning of the decisions of the Circuit Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States, which required that a man must be accused of a crime in order to give the court jurisdiction to pronounce sentence, and this question, under the protection of the Constitution of the United States could be raised for the first time ever in the Supreme Court of the United States. For the reasons

stated, the demurrer should have been sustained, the indictment dismissed, and the judgments of the trial court and the Circuit Court of Appeals reversed.

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated at Fairbanks, Alaska, this 17th day of April, 1954.

Respectfully submitted,

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APPENDIX "A"

Act of Congress, March 3, 1899, establishing the penal and criminal laws of the United States of America, and the procedure thereunder relating to the District of Alaska, particularly Chapter 429 of the United States Statutes at Large, 55th Congress, 1897-1899:

Chapter Seven, Sec. 38, Page 1289.

That the indictment must contain:

FIRST. The title of the action, specifying the name of the court to which the indictment is presented and the names of the parties.

SECOND. A statement of the facts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

Chapter Thirteen, Sec. 184, Page 1282.

"That crimes are divided into felonies and misdemeanors. A felony is a crime punishable with death, or which is or may be punishable by imprisonment in the penitentiary. Every other crime is a misdemeanor."

Chapter Three, Sec. 54, Page 1260.

"That if any person shall, by any false pretenses or by any privy or false token, and with intent to defraud, obtain, or attempt to obtain, from any person any money or property whatever, or shall obtain, or attempt to obtain, with the like intent, the signature of any person to any writing the false making whereof would be punishable as forgery, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one nor more than five years. The making of a bill of sale, or assignment, or mortgage of personal property, by any person not the owner thereof, for the purpose of obtaining money or credit or to secure an existing indebtedness, shall be deemed a false pretense within the meaning of this section."

Chapter Ten, Page 1294.

Sec. 88. "That the only pleading on the part of the defendant is either a demurrer or plea."

Sec. 89. "That both the demurrer and plea must be put in, in open court, either at the time of the arraignment or at such other time as may be allowed to defendant for that purpose."

Sec. 90. "That the defendant may demur to the indictment when it appears upon the face thereof either—

First. That the grand jury by which it was found had no legal authority to inquire into the crime charged, because the same is not triable within the District.

Second. That it does not substantially conform to the requirements of chapter seven of title two of this Act.

Third. That more than one crime is charged in the indictment.

Fourth. That the facts stated do not constitute a crime.

Fifth. That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the crime charged, or other legal bar to the action."

Sec. 91. "That the demurrer must be in writing, signed either by the defendant or his attorney, and filed. It must distinctly specify the ground of objection to the indictment, or it may be disregarded."

Sec. 92. "That upon the demurrer being filed, the objections presented thereby must be heard, either immediately or at such time as the court may direct."

Sec. 93. "That upon considering the demurrer, the court must give judgment, either allowing or disallowing it, and an entry to that effect must be entered in the journal."

Sec. 94. "That if the demurrer be allowed, the judgment is final upon the indictment demurred to, and is a bar to another action for the same crime, unless the court, being of opinion that the objection on which the demurrer is allowed may be avoided in a new indict-

ment, direct the case to be resubmitted to the same or another grand jury."

Sec. 95. "That if the court do not direct the case to be resubmitted, the defendant, if in custody, must be discharged, or if admitted to bail his bail is exonerated, or if he have deposited money in lieu thereof the money must be refunded to him."

Sec. 96. "That if the court direct the case to be resubmitted, the same proceedings must be had thereon as are prescribed in sections eighty-five and eighty-six of this Title."

Sec. 97. "That if the demurrer be disallowed, the court must permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow; but if he do not plead, judgment must be given against him."

Sec. 98. "That when the objections mentioned in section ninety-three appear upon the face of the indictment, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime, may be taken at the trial, under the plea of not guilty and in arrest of judgment."

Alaska Compiled Laws Annotated 1949.

The forms for indictment are contained in the appendix of said Act of Congress on pages 1341, 1342, and 1343, and no form for obtaining or attempting to obtain money by false pretenses is included in said appendix of said act (Sec. 66-9-5, Page 2326).

"When indictment sufficient. That the indictment is sufficient if it can be understood therefrom:

First. That it is entitled in a court having authority to receive it, though the name of the court be not accurately stated;

Second. That it was found by a grand jury of the political division in which the court was held;

Third. That the defendant is named, or if his name can not be discovered, that he is described by a fictitious

name, with the statement that his real name is to the jury unknown;

FOURTH. That the crime was committed within the jurisdiction of the court;

FIFTH. That the crime was committed at some time prior to the finding of the indictment, and within the time limited by law for the commencement of an action therefor;

SIXTH. That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;

SEVENTH. That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case" (Sec. 66-9-14, pages 2333 and 2334).

"Evidence on trial for false pretenses. That upon a trial for having, by any false pretense, obtained the signature of any person to any written instrument, or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing; but such pretense, or some note or memorandum thereof, must be in writing, and either subscribed by or in the handwriting of the defendant. This section does not apply to an action for falsely representing or personating another, and in such assumed character receiving any such valuable thing" (Sec. 66-13-60, Page 2369).